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MINUTES
FEBRUARY 25, 2014

The regular meeting was called to order by Chairman Robert Melillo at 7:31 P M.

Present were Jeffrey Barath, Christina Chieffalo, Rick P. Jowdy, James Kelly, Robert Laber, Annette Zatkovich, Chairman Robert Melillo, and Alternate Kevin Haas. Also present was Planning Director Dennis Elpern.

Absent were Sally Estefan, Theodore Haddad Jr. and Alternates Robert Arconti and Robert Oravetz. Chairman Melillo explained that the Vice-Chairman Haddad is recusing himself from both the items on tonight's agenda and had family business to take care of this evening. Mrs. Estefan is sick and Mr. Oravetz is out of town on business.

Chairman Melillo asked Mr. Haas to take Mrs. Estefan's place for the items on tonight's agenda

Mrs. Chieffalo led the Commission in the Pledge of Allegiance.

Mrs. Chieffalo made a motion to accept the January 14, 2014 and the January 28, 2014 minutes. Mr. Kelly seconded the motion and it was passed unanimously.

Chairman Melillo said there are no new public hearings scheduled for this evening, so they would get right to the Continuations of public hearings. He then said for the record, both of these public hearings listed on the agenda as Continuations can remain open until March 20, 2014. He added that there was some confusion about when these hearings have to be closed, but we have received letters from Attorney Paul Jaber clarifying these dates.

Petition of Caraluzzi's Danbury Market, LLC for a Special Permit for the Sale of Grocery Beer at 102 Mill Plain Rd. (#C14014).

Chairman Melillo said this was continued because the Regulations say this Commission cannot take action on these petitions until the Planning Commission takes action on the Special Exception/Revised Site Plan application. He said the Planning Commission

will be looking at a resolution for a possible decision at their March 5, 2014 meeting. He then said there was a letter in this and the package store file that should have been read into the record, but was forgotten. He read a letter from the owner of 100 Mill Plain Rd. (L. Craig Lemle), which was received in the Planning Office on November 27, 2013. He then respectfully requested that the speakers not repeat what has already been said and only present new information, as this is the third public hearing on these matters and all of the previous testimony has been recorded in the minutes and on the videotape.

Attorney Paul Jaber said with him this evening is Mark Carluzzi, a principal in the LLC that is the applicant. He said he did not want to repeat himself as this hearing has been open since December 10, 2013. He pointed out that the letter from Mr. Lemle mentions the easement for the accessway to get to the traffic light at the Aunt Hack intersection. He said that as part of the special exception application, the Department of Transportation (DOT) has approved a traffic signal for the driveway to this site. He referred to the color rendering that is in the file, saying this site is adjacent to 100 Mill Plain Rd. It is owned by a New York state company and was already approved for a 42,000 sq.ft. shopping center. The Caraluzzi family is the contract purchaser and they are before the Planning Commission requesting to change the use to a smaller retail food market, a package store and another small retail shop. They had to go back to the Planning Commission because food stores generate more traffic than general retail does. He then said this Commission must make specific findings in accordance with the criteria in the Zoning Regulations. He said regarding the general criteria in Sec. 3.F.2., there are no churches, other places of worship, or schools in the immediate vicinity. This site is a substantial distance from any residential uses and the approved traffic signal will bring the level of service (LOS) to a more than an acceptable number. Additionally the area in the food store that will be devoted to the sale of beer is less than 1,000 sq.ft., which is a very insignificant number in relation to the area devoted to groceries. So the traffic generated by this small area will be minimal. He then said the Planning Commission has the authority to approve the grocery use, but this Commission has the authority to approve the sale of beer. He said additionally this application satisfies the specific criteria listed in Sec. 10.C.4.a. of the Regulations. It will not emit any noise, smoke, glare or odor and is designed in character with the area; as there are several other grocery stores on this street which sell beer. It will not create a negative impact on the traffic; as demonstrated by their traffic engineer testifying that with the new traffic signal, they will retain the existing LOS or even better. And lastly, it will not create any emission harmful to the environment. He added that Environmental Impact Commission (EIC) has already determined there are no wetlands on this site and approved this use. He said this also complies with the specific criteria in Sec. 3.F.2.c., as grocery stores are allowed in this zone and they will apply to the State once the special permit is approved. He said these are the conditions that this Commission must review and use to determine if this application should be approved.

Chairman Melillo asked if there was anyone to speak in opposition to this petition and one person came forward.

Attorney Greg Cava asked if at this time they were only discussing the grocery beer permit. Chairman Melillo said yes that was what they were talking about at this time. Attorney Cava said he would save his comments for the discussion of the package store permit since they are related to that.

Chairman Melillo asked Mr. Elpern if he had any comments and he said he would reserve them until the next meeting.

Chairman Melillo said Corporation Counsel has requested they continue both of the hearings this evening. Mr. Kelly made a motion to continue this hearing until the next meeting. Mr. Jowdy seconded the motion and it was passed unanimously.

Petition of Caraluzzi's Wine & Spirits, LLC for a Special Permit for a Package Store License at 102 Mill Plain Rd. (#C14014).

Attorney Jaber said this public hearing was opened at the same time as the grocery beer one. He added that the letter from Mr. Lemle did state it was for both petitions. He reiterated that Mark Caraluzzi was present this evening representing the LLC that was listed as applicant. At this point, Chairman Melillo requested that Attorney Jaber present new information only as all of the previous testimony has been recorded. Attorney Jaber said this is the same location on Mill Plain Rd. as the food store described in the previous hearing. He said they are currently awaiting a decision from the Planning Commission on the Special Exception/Revised Site Plan application that will allow the change of use to a food store from the previous generic retail approval. He then said the general and specific criteria listed in Sec. 3.F.2. as well as the specific criteria listed in Sec 10.C.4. of the Regulations must be satisfied in order for this Commission to approve a package store. He said regarding the general criteria in 3.F.2.a., this will have no detrimental effect on any churches or schools nor will it have a detrimental effect on the immediate area. He added that this area is commercially zoned and contains a mix of hotels, strip centers, office buildings and other package stores. He added that they have had expert testimony from a traffic engineer (who has worked on most of the development done in this area) that the installation of a traffic signal will maintain or improve the levels of service. He said regarding the criteria in 10.C.4.a., this will not emit any noise, smoke, glare or odor and is designed in character with the area; it is similar in design to at least two other buildings in the area. It will not create a negative impact on the traffic and there are

no adverse safety issues. Additionally, it will not cause any harm to the environment. He added that Environmental Impact Commission (EIC) has already determined there are no wetlands or endangered species on this site and approved this use. He said lastly, regarding the special criteria in 3.F.2.d., at the last meeting the issue was raised by the opposition as to which entrance to their store the measurement should be taken from. On the map submitted with this application, the measurement was taken to what was thought was the main entrance to their package store, but Attorney Cava has insisted that the door labeled "bottle redemption" is their main entrance. So they had the surveyor recalculate the distance from the applicant's main door to the "bottle redemption" door, which is closer to the applicant's site. The opposition also criticized the way the line was drawn from the applicant's door out to Mill Plain Rd., so they had the surveyor change this line to a straight line. This new measurement came out to 2,070 feet, meaning that they are still in compliance with the regulation. So they have addressed the issues brought up by the opposition regarding how the distance was measured. Regarding the second part of the regulation, they are not within 500 feet of any church, school or other place of worship. He said he believes they have satisfied all of the necessary criteria. Attorney Jaber then offered to answer any questions the Commission might have.

Mr. Jowdy asked if the package store location shown on the rendering is cut in stone. Attorney Jaber said it could be moved to the other end of the shopping center which would be farther from the package store located at 71 Mill Plain Rd.

Chairman Melillo asked if there was anyone to speak in opposition to this application and Attorney Cava came forward.

Attorney Greg Cava said he is representing the Mill Plain Package Store. He said he does not want to repeat himself but the way the applicant is interpreting the Regulations is wrong. He said the Regulations say you cannot have a package store within 2,000 feet of another package store, "as measured along public streets on which they front, connecting one lot of said use to the other". He said the way the applicant interprets it is they start at the door, go through the parking lot out to the roadway, travel down the roadway, and then through the parking lot using the parking aisles to the door of the building. The problem is that the rules of construction apply to zoning ordinances, zoning is creature of Statute and there is no common law zoning. There was no zoning until the first ordinances were done in the 1920's. So under the law in Connecticut, zoning regulations will be strictly construed. There is also case law that says you cannot imply anything unless it is literally stated in the zoning statute. He continued saying you cannot pretend, imply, or come up with concepts about what it means; all that matters is what the regulation actually says. He said no matter how you look at this regulation; you cannot find any words about traveling through parking lots, along walking paths or driving path. The only

thing ~~its~~ says is that you measure along the road. ~~He said. T~~he only rational purpose of saying you measure from this entrance to that entrance is to tell you where to start. ~~And t~~The only portion of the measurement that can be taken into consideration are the parts along the road. He said they actually sent Paul Hiro out to measure this in the field unlike the applicant whose surveyor compiled their information from existing maps. There is a difference and that is why their maps are titled general location survey and the applicant's is titled data accumulation plan. He said Mr. Hiro measured the line and the distance is 1,560 feet. Even if they move the package store to the other end of the shopping center, they still will not be 2,000 feet from his client's store. Even if they put it on the next lot over, it still would not be 2,000 feet from his client's store. He then said there is another rule of statutory construction that must be taken into consideration here, which is that you cannot interpret statutes in a manner that leads to absurd results. He said their interpretation is irrational because if you do it their way, you could have adjacent lots and put package stores on them that have front doors literally forty feet apart but still have them be 2,000 feet apart according to their interpretation of how to measure the distance. He demonstrated this using a drawing (identified as hypothetical separation distance) which was submitted and labeled Exhibit L. He said this is the very definition of an irrational and absurd interpretation of the regulation. He said Mr. Elpern had said his intent in drafting the change to the regulation was not to make the regulation less stringent, but if you look at the old way of measuring this, the new regulation is about twenty percent less stringent than the old regulation was. At this point, he said for the record, the bottle redemption door is part of the package store. It is used by customers to redeem their bottles and then they continue into the package store making it the nearest pedestrian entrance. He continued saying if you use the old way of measuring this, almost the entire applicant's property would be within the 2000 foot radius making it impossible for them to put a package store on it. He said using this method, it is geometrically impossible to interpret the regulation the way the applicant wants and have it be more than 2,000 feet. He said based on that, Mr. Elpern is wrong, this new regulation is not more stringent. The only way you can interpret this regulation to be more stringent is to only use the measurement along the road, not to include the distance to the door. And that is not how the applicant has measured it, so this new regulation must be less stringent. He said there are no words in the regulation that say how you get to the road or how you cross the parking lot and you cannot put words into the Regulations that are not there. It will not help them to move the store to the other end of the strip because it still will be less than 2,000 feet. He said if the intent was to measure from door to door then they did not need to change the regulation because the old regulation was obviously door to door and was more stringent than the applicant's interpretation but less stringent than the way the current regulation is drafted. He said they cannot put words into the regulation because the court will not allow them to do it. He then said if the Commission approves this, they will not be doing the applicant any favors. They will

be costing them tens of thousands of dollars in legal fees so they can fight it out in an appeal and possibly get a decision in fourteen months to five years. He continued saying the bottom line is they have no right to this package store, it is too close. If the goal is to get Caraluzzi's into this town, this is not going to get them into Danbury. It will definitely be appealed and they will definitely lose the appeal. He reiterated that they cannot put words into the Regulations. He then said the applicant tried to say you must follow a pedestrian path but it does not say that. The only use of the word pedestrian is in reference to the entrance and every entrance to a store that people go through is a pedestrian entrance. He said you cannot drive your car into a store, you walk into it. He said the words path or vehicular path are not in the Regulations, all it says is to measure along the road. He added that between the door and the road is only an orientation and that is the only way to interpret this regulation consistently. He then offered to answer questions from the Commission.

Mr. Barath asked Attorney Cava if Mill Plain Rd. is a public street in his opinion. Attorney Cava said of course it is; it is a State highway. Mr. Barath asked if the street from Mill Plain Rd. into the parking lot is a public street. Chairman Melillo said that would be a driveway. Attorney Cava said once it leaves the public street, it becomes a driveway. Mr. Barath asked the definition of a public street. Attorney Cava said it's one where the general public has the right of way over it and in this case the only public street they are talking about is Mill Plain Rd. Mr. Barath said so that means the only public street is from the opposition's store to the proposed driveway into the applicant's property. Attorney Cava said that is correct, the only public street is Mill Plain Rd. Mr. Kelly asked Attorney Cava if he is using the State Zoning Regulation Statutes regarding the determination of what a public street is, because the Zoning Regulations describe door to door. Attorney Cava said the Zoning Regulations do not say that, they used to say that before they were changed. He said the first part of the Regulation says as measured along the public streets on which they front but the second part (in a shopping center) says it is measured between the closest pedestrian entrances. He said they are using two different sets of words to describe two circumstances. He said the old regulation was a door to door regulation, and it was replaced with the along the street regulation. It was supposed to make it more stringent but if you interpret it the way the applicant does, it becomes less stringent.

Chairman Melillo then said he is not looking to debate the location of the entrance, but wanted some clarification since Attorney Cava had said the bottle redemption door is part of the store. Chairman Melillo continued saying he had visited the site and after entering he looked for the bottle redemption door but the only way to get to it was clearly labeled "employee entrance only", so he is curious as to how that second door to bottle redemption area is a pedestrian entrance. Attorney Cava said employees are pedestrians too; the regulation does not say customer pedestrian entrance. He then called upon one of the owners of Mill Plain Package Store, to come

forward and answer the question. This led to a commotion in the audience with several people attempting to speak. Chairman Melillo requested that one person come forward to provide the information instead of everyone trying to answer from the audience. He asked that the audience respect the fact that the secretary finds it difficult to hear the person speaking when there is too much commotion in the audience.

Scott Benincasa, owner of Mill Plain Package Store said to answer directly: “on the exterior door where it says bottle redemption, it does not say employee entrance only”. He added that he is not sure if the Chairman was looking at the interior of the store, there is a curtain that says employee only but it does not say it on the exterior door. He then said if you go in the bottle redemption and put down your bottles, you can walk through and go in. Chairman Melillo asked if one can make a purchase in the bottle redemption room. Mr. Benincasa said there is no point of sale purchase in the bottle redemption room. Attorney Cava asked Mr. Benincasa if you can get to main store from the bottle redemption door. Mr. Benincasa said absolutely, it is a twenty foot walk from the bottle redemption into the area that sells alcohol. Attorney Cava said this is clearly a pedestrian entrance, people walk through it. He said pedestrian entrance (designed for people to walk through) is used to differentiate it from a loading dock (designed for deliveries) and it does not matter if that pedestrian is an employee or a customer. Mr. Laber then asked what percentage of the people who enter through the bottle redemption door to redeem bottles actually enter the store and buy product. Mr. Benincasa said he had never really kept track of that but if he had to guess, he would say that about 95 out of 100 customers who return bottles actually purchase alcohol.

Chairman Melillo asked Mr. Elpern if he had any comments and he said he would reserve them until the next meeting.

Attorney Jaber spoke in rebuttal to Attorney Cava’s comments. He asked the Commission to not take into consideration the threat of an appeal. If it does happen they will defend it in court; but it should not be part of their decision. He said it does not matter if the old Regulation was more stringent because all that matters is what is in effect now. He said the City changed the regulations so the language about distance measurements would be consistent. Previously, the language about measuring the distance between package stores used to be different than the language about measuring the distance between package stores and churches or schools. He said that difference used to cause too much confusion and that is why it was changed. He added that never was it stated by anyone, especially Mr. Elpern, that the new regulation was less stringent. He said that he would never have interpreted this regulation the way that Attorney Cava is interpreting it. He questioned how you get around the words “from a main entrance to a main

entrance". He said he does not understand how Attorney Cava can say you measure it from the street. He added that even the second sentence regarding measuring within a shopping center says you measure from the main entrance of one package store to the main entrance of the other package store. He said this is the way it is written, it is consistent, so he does not understand how Attorney Cava can say it is not done that way. He then said he agrees with Attorney Cava that this is his interpretation; but it also is this Commission's interpretation. This is demonstrated by the approval they granted at their last meeting for a package store on Newtown Rd. He continued saying that the map filed with that application was the same "design" as the one being used with this application. The measurement used was from the main entrance of the existing package store (located in the Berkshire Shopping Center) to the main entrance of the proposed package store (located in the adjacent Plumtrees Plaza Shopping Center). He said based on this, it would be inconsistent for them to interpret this differently. He said that is all he has for tonight. There were no questions

Mr. Barath then said his concern is how the measurement is to be made. He asked if there is an official determination of how they measure or past practice of other cases for them to follow. Chairman Melillo said it has been past practice to go door to door; he does remember after while they were reviewing or after the amendment was passed hearing it said that it would bring into consistency the practice that was being done regarding how the measurement was to be taken. He said the best answer is for this Commission to get an answer from the Zoning Enforcement Officer. He is the designated interpreter of the Zoning Regulations, and they should receive an opinion from him by the next meeting.

Attorney Cava said since Attorney Jaber brought up a new point about them approving the other application for a package store at the previous meeting, he wanted to make one point. He said he presumes that was one of Mr. Jaber's applications; just because you have a practice of doing something wrong, does not mean it is justified to do it again. He said that applicant could have just gotten lucky by no one showing up in opposition. He said that decision does not bind or indicate that the Commission was right. He said there is nothing in the Regulations that tells them how to measure this situation. He continued saying that all they have here is a group of suppositions. There was nothing about the distance requirement discussed when this regulation was adopted; it was "supposed" to correct some ambiguity in the regulation. He said he reviewed the file and listened to the tapes of the public hearing and when the regulation was acted on and there are fewer words said about this regulation than there were in the Pledge of Allegiance. He said there was no discussion about anyone doing it wrong. He said he looked at some previous applications and they were consistent in that the distance was measured by radius; there was no ambiguity. He said the only discussion was about the second part of

the regulation, relating to shopping centers, but that does not apply here because only one of the package stores is located in a shopping center. He is still claiming the regulation does not say to measure from door to door, because it says to measure along the street. At this point, Chairman Melillo said he had granted him leeway, but he had finished his comments about Attorney Jaber's additional point.

Chairman Melillo then said the application they approved at the last meeting was not represented by Attorney Jaber. ~~(should there have been a mention earlier that Attorney Cava had suggested that Attorney Jaber represented that application therefore prompting this clarification.)~~ He said that applicant was the family that owns the package store by Trader Joes who is opening a second package store on Newtown Rd. He said Corporation Counsel has requested they continue the public hearing on this matter.

Mr. Barath made a motion to continue the public hearing. Mrs. Chieffalo seconded the motion and it was passed unanimously.

NEW BUSINESS

SST Auto Inc. d/b/a Speedsport Tuning, 52 Miry Brook Rd. (#F19049) – Application for upgrade from Motor Vehicle Repairer's License to Used Car Dealer's License. Public hearing scheduled for March 25, 2014.

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Chairman Melillo said this Commission had previously approved the Motor Vehicle Repairer's license for this site. He added that retail sales are not allowed in the IL-40 Zone, but this location was granted a Use Variance w/stipulations by the Zoning Board of Appeals to allow Motor Vehicle sales in this zone. He said at this time there is no action necessary on this matter; they will review and discuss this at the public hearing on March 25, 2014.

Chairman Melillo asked if there was anything to discuss under Other Matters and there was nothing. He said listed under For Reference Only is one public hearing scheduled for the March 11, 2014 meeting.

At 8:40 PM, Mr. Haas made a motion to adjourn. Mr. Kelly seconded the motion and it was passed unanimously.